IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08/08/2003

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THE HONOURABLE MR.JUSTICE M. CHOCKALINGAM

CRL. APPEAL NO.1011 OF 1995 AND CRL.APPEAL NO. 1012 OF 1995
AND
CRL.REVISION CASE NO.622 OF 1994

State by Public Prosecutor
High Court, Madras .. Appellant in
both appeals

-Vs-

1. Devendran
2. Mani @ Balasubramani
3. Thangavelu .. Respondent in
CA.1011 of 1995

Thirumalai @ Thirumalaisami .. Respondent in
CA.1012 of 1995

CRL. R.C.NO.622 OF 1994:

Thirumalai @ Thirumalaisami .. Petitioner

Vs.

State
rep. by Inspector of Police
Sankagiri .. Respondent

These criminal appeals are preferred under Section 378 of IPC against the common judgment dated 18.10.1994 in CA.Nos.7 and 11 of 1993 respectively on the file of the I Additional Sessions Judge, Salem and the criminal revision case is preferred under Section 397 and 401 Cr. P.C. against the conviction and sentence imposed upon the petitioner by the learned I Additional Sessions Judge, Salem in CA.No.11 of 1993 dated 18.10.1994.

!For Appellant : Mr.V.Jaya Prakash Narayan
Govt. Advocate (Crl. Side)
in CA.1011 and 1012 of 1995
and for respondent in
Crl.R.C.No.622 of 1994

^For Respondents: Mr.V.Gopinath, SC
for Mr.K.Selvarangam
petitioner in Crl.R.C.No.622/1994
respondent in CA.1012 of 1995

Mr.R.KArthikeyan
for R2 and R3 in CA.1011 of 1995

R1 - died

:COMMON JUDGMENT

This Judgment shall govern both criminal appeals, namely, C.A.Nos.10
11 and 1012 of 1995 and criminal revision case No.622 of 1994.
2. These two criminal appeals have been brought forth by the State challenging the judgment of the learned I Additional Sessions Judge, Salem acquitting A2 to A4 in respect of all the charges levelled against them and A1 in respect of the charge under Section 395 IPC, while of them were found guilty by the trial court, namely, the Assistant Sessions Judge, Sankari where they stood charged, tried, found guilty under Sections 395 and 451 IPC and sentenced to undergo 7 years RI each under Section 451 IPC and 7 years RI with a fine of Rs.1500/- in default one year RI each under Section 395 IPC. The first accused on the affirmation of conviction and sentence under Section 451 IPC by the Sessions Court has brought forth the criminal revision case.
3. The short facts necessary for the disposal of these appeals and revision case can be stated as follows:
a) On 7.9.1987 at about 11.30 p.m. the accused 1 to 4 along with two others rang the calling bell of P.W.1's house situated at Pullipalayam. P.W.1 Appukounder, on hearing the sound woke up, switched on the lights and opened the door of the house. A1 to A6 suddenly got entry into the house with an intention of committing dacoity in the house of P.W.1. All the six accused asked P.W.1 where he has kept the jewels and cash and to show the same. Selvakumar, who was one of the absconding accused pushed P.W.1 into his bedroom and threatened him at the point of Aruval if P.W.1 does not give any jewels or cash, they would kill the entire family of P.W.1. When P.W.1 refused, Selvakumar attacked him with Aruval on his left side neck. P.W.2, Pavayi the wife of P.W.1 prevented the said attack and she also sustained injuries on her right hand. P.W.1 asked his daughter Nirmala, who was not examined, to get the revlver in order to scare the accused. The said Nirmala rushed into the kitchen to make the accused believe as if she would get the revolver. Immediately, all the accused fled away from the scene of occurrence by leaving M.O.1 Aruval, M.O.2 one pair chappals and M.O.3 one towel by using four bicycles M.O.4 to M.O.7.
b) P.W.1 chased all the accused with the help of P.W.4 Sembulingam, the lorry driver. P.W.1 was able to catch A1 along with M.O.5 bicycle. It was informed to P.W.13 Soundararajan Sub Inspector of Police through phone at about 12.00 p.m. P.W.13 on receipt of information proceeded to Narayanapalayam and examined P.W.1 and recorded his statement under Ex.P.1.

He arrested A1 at about 1.00 a.m. On 8.9.1987 and recovered bicycle M.O.5 under Ex.P.4 in front of P.W.7 Chinnagounder and another witness. He sent P.W.1 and P.W.2 with medical memo to the Government Hospital, Sangagiri where P.W.15 Dr.Gnanasekaran examined P. W.2 at about 1.40 a.m. and issued Ex.P.17 Accident Register. At about 1.55 a.m. the Doctor examined P.W.1 and issued Ex.P.18 Accident Register.

c) P.w.13 brought A1 to the Police Station and on the strength of Ex.P.1, he registered a case in Crime No.527 of 1987 under Section 398 IPC. Express printed F.I.R Ex.P.14 was despatched to the concerned court, while the copies were sent to higher officials. P.W.14 Manickam, Inspector of Police, Sangagiri Police Station took up investigation. On 8.9.1997 he proceeded to the site of occurrence at about 4.30 a. m. and prepared Ex.P.5 observation mahazar and Ex.P.5 rough sketch in front of P.W.8 Kandasamy Village Administrative Officer and other witness. P.W.14 examined P.W.1 to P.W.3 and other witnesses and recorded their statements. He recovered M.O.1 to M.O.3 under Ex.P.6 in front of P.W.8 and another witness. Then, P.W.14 on information proceeded to Thiruchencode where M.Os.4 and 6 cycles were recovered under Ex.P.7 from the cycle shop of P.Ws.6 and 7. P.W.14 examined P.Ws.5,6,7,4 and other witnesses and recorded their sta tements. He interrogated A1 and recorded A1's voluntary confessional statement in front of P. W.8 and other witness. Then, P.W.14 sent A1 for remand.

d) On 9.9.1987 at about 5.30 a.m., P.W.14 arrested the absconded accused Murali and A4 and recovered M.O.7 cycle from A4 under Ex.P.16 in front of the witnesses. He sent the absconding accused Murali and A4 for remand. On 19.9.1987, he arrested A2 and sent him for remand. On 11.9.1987, A3 and absconding accused Selvakumar surrendered before the Court. On 29.9.1987, P.W.9 Judicial Magistraqte, Thiruchengode conducted Test Identification Parade at Sub Jail at Sangagiri in respect of A1 to A4 and absconding accused Murali and prepared Ex.P.11 report. P.Ws.1 and 2 identified the accused properly. P.W.14 examined P.Ws.1 and 2 and other witnesses. On completion of investigation, he filed a charge sheet under Section 451, 398 r/w 395 IPC.

4. In order to prove the charges levelled against the four accused, since two of the other accused were absconding, the prosecution examined 15 witnesses and marked 18 exhibits and 7 M.Os. On completion of the evidence on the side of the prosecution, the accused 1 to 4 were questioned under Section 313 of Cr.P.C as to the incriminating circumstances found in the evidence of the prosecution witnesses, which they flatly denied as false. No defence witness was examined. No documents and material objects were marked on the side of the defence. The trial court on consideration of the rival submissions made and scrutiny of the materials available has found the accused guilty under Section 395 and 451 IPC and sentenced them to undergo imprisonment as stated above. Aggrieved over the same, all the accused, namely, A1 to A4 preferred an appeal in C.A.Nos.7 and 11 of 1993. The learned I Additional Sessions Judge, Salem after due enquiry of appeals, has acquitted A2 to A4 in respect of all the charges and A1 in respect of the charge under Section 395 IPC, but found A1 guilty under Section 451 IPC and confirmed the sentence in respect of A1. Aggrieved over the same, the State has brought forth these two appeals challenging the acquittal of A2 to A4 under Section 395 and 451 IPC and the acquittal of A1 under Section 395 IPC, while A1 aggrieved over the confirmation of conviction and sentence by the Sessions Court under Section 451 IPC has brought forth the criminal revision case.

5. Arguing for the State, Mr.V.Jaya Prakash Narayan, the learned Government Advocate (Criminal Side) made the following submissions for consideration by this Court.

The trial court on appreciation of the evidence properly found all the four accused guilty under Sections 395 and 451 IPC. Since two of the accused were absconding, the trial in respect of those two accused could not be proceeded with. The prosecution has adduced necessary and sufficient evidence to hold them guilty, but the appellate court, namely, the Court of Sessions on erroneous consideration and on erroneous view has acquitted A2 to A4 in respect of all the charges and A1 in respect of the charge under Section 395 IPC. The learned Sessions Judge, to make deviation from the judgment of the trial court, has taken into consideration that though the identification parade was procedurally done by P.w.9, the prosecution witnesses have spoken to the fact that the accused were shown to them already in the Police Station. But, that view of the learned Sessions Judge was not correct, since P.W.1 has never stated in his evidence that at any point of time there was an occasion for him to see the accused in the Police Station and that too before identification parade was conducted, and thus, he has given a categorical evidence. Even the evidence of P.W.2 was cogent and acceptable in respect of the incident that has happened. Apart from the said evidence, the prosecution has adduced sufficient evidence as to the arrest and interrogation made and recovery of cycles, which belonged to P.W.6 and P.W.7 and the cycles have also been identified by them. The said cycles were taken by the accused on hire. Under the stated circumstances, there was ample evidence to connect the accused to the crime in question, and hence, the judgment of the Sessions Court has got to be necessarily set aside and the judgment of the trial court has got to be restored.

6. Added further the learned Government Advocate that the criminal revision case filed by the first accused to set aside the conviction and sentence imposed by the trial court under Section 451 IPC, which was affirmed by the Sessions Court, does not carry any merit whatsoever in view of the fact that A1 was caught red-handed along with M.O.5 cycle. A1 and M.O.5 were produced before the court immediately and there was clinching evidence pointing to his guilty. Hence, the appeals filed by the State have got to be allowed and the revision filed by A1 has got to be dismissed.

7. Strongly opposing all the contentions put forth by the State, the learned Counsel appearing for A2 to A4/ respondents in two appeals would submit that the entire identification parade was thoroughly vitiated, since P.W.2 has categorically spoken to the fact that all the accused were shown to the prosecution witnesses in the Police Station. There was no confessional statement recorded by the Police to prove the recovery of cycles, which were identified by P.Ws.6 and 7. The appellate Court in extenso has discussed the lacuna and the infirmities in the judgment of the trial court. There was no evidence to connect A2 to A4 to the crime in question. The trial court without proper appreciation of the evidence, has found the accused guilty under the above stated provisions, and hence, the judgment of the Sessions Court acquitting A2 to A4 of all the charges levelled against them has got to be affirmed.

8. The learned counsel appearing for A1 in the revision case would contend that the prosecution was able to bring forth sufficient evidence before the trial Court in respect of conviction and sentence under Section 451

IPC. It was only an attempt of robbery, but no articles were taken away. A1 was a student at that time and now he is working as a driver under a Lawyer and there was all possibility to reform and he was also chosen as one of the best chess players in District and State level and he is coaching the children for chess tournament. Therefore, under the stated circumstances, this Court can exercise some leniency by setting him free.

9. This Court paid its full attention on the submissions made by both sides and made a careful scrutiny of the available materials.

10. The gist of the prosecution case was that A1 to A4 and the other two absconding accused made illegal entry into the house of P.W.1. The absconding accused Selvakumar was armed with Aruval. They threatened P.Ws.1 and 2 and asked them as to where the jewels and cash were kept. When P.W.1 refused, Selvakumar attacked him with Aruval on his left side neck, and injuries were caused to P.W.1. P.w.2 prevented the said attack and she also sustained injuries. At that time, P.W.1 asked his daughter Nirmala to get the revolver in order to scare the accused, and the said Nirmala rushed to the kitchen to make the accused believe as if she would get the revolver. Immediately, all the accused fled away from the scene of occurrence by leaving MO1 Aruval, MO2 one pair of chappeals and MO3 towel. P.W.1 chased all the accused with the help of P.W.4. A1 was caught by P.W.1 and an information was given to the police. A1 along with MO5 cycle were handed over to the police. A case was registered and proceeded with.

11. Admittedly, all the accused were not known to P.Ws.1 and 2 previously. The occurrence has taken place during night hours. As rightly pointed out by the learned Government Advocate, there is ample evidence to show that A1 was caught red-handed and he was handed over to the police along with MO5 cycle, which belonged to P.Ws.6 and 7. This evidence of P.W.1 was fully corroborated by the evidence of P.W.4 a lorry driver. No reason or circumstance is put forth by the learned counsel appearing in the revision case to disbelieve or reject the evidence of P.W.4, a corroborative piece of evidence, and thus, this court is able to see that both the courts below were perfectly correct in finding that there was a case against A1 under Section 451 IPC. Insofar as the case against A2 to A4 is concerned, this Court has to necessarily disagree with the case of the State. As referred to above, all the accused were not known to the prosecution witnesses previously. The Test Identification Parade, on request made by the Investigating Officer, was conducted by P.W.9 and the courts below have pointed out that in the course of identification parade, the witnesses were able to identify the accused properly and there is no quarrel about the same. P.W.2 in her cross examination has categorically admitted that the accused Nos.2 to 4 were shown to her in the police station prior to the identification parade. Hence, the identification parade is of no consequence. The contention of the learned Government Advocate that P.W.1 and P.W.2 have identified the accused properly cannot be accepted for the simple reason that there is evidence to show that the prosecution witnesses have seen the accused in the police station before the identification parade was conducted, though the same was procedurally done at the time of test. It is pertinent to point out that the accused Nos.2 to 4 were shown in the police station to the witnesses, which supported the case of defence. Under the stated circumstances, this court has to necessarily hold that the identification parade is of no consequence and it has got to be rejected.

12. The next contention that was alleged by the learned Government Advocate was that there was recovery of M.O4 to M.O.7 cycles. There is no dispute that these cycles belonged to P.W.6 and P.W.7, since they were identified by them. But, no cycles were recovered from the accused pursuant to the confessional statement. The witnesses examined in order to prove the same have turned hostile. Hence, the prosecution's case has got to be disbelieved. Therefore, the identification parade which relied on by the prosecution is rejectionable and the recovery of cycles has also not proved. Under the stated circumstances, the Sessions Court was perfectly correct in setting aside the judgment of the trial court in respect of A2 to A4. Hence, there is nothing to interfere in the judgment of the learned I Additional Sessions Judge, Salem acquitting A2 to A4 of all the charges levelled against them and A1 in respect of the charge under Section 395 IPC. The Sessions Court was perfectly correct in confirming the conviction and sentence imposed on A1 under Section 451 IPC.

13. Coming to the question of sentence, the trial court has awarded sentence of seven years RI each under Sections 451 and 395 IPC to accused Nos.1 to 4. Taking into consideration the age of the first accused and he is working under a Lawyer and the affidavit filed by his mother and his lawyer and the other circumstances, the punishment awarded by the trial court to the first accused under Section 451 IPC is reduced to three years RI.

14. In the result, both the criminal appeals and the criminal revision case are dismissed. The Sessions Judge shall take steps to commit the accused No.1 to prison, if he is on bail, to undergo the remaining period of sentence.

Index : Yes
Internet : Yes

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To

1. The Judicial Magistrate No.I, Sankari
2. The Judicial Magistrate No.I, Sankari
through the Chief Judicial Magistrate, Salem
3. The Judicial Magistrate No.I, Sankari
4. The I Addl. Sessions Judge, Salem
5. The I Addl. Sessions Judge, Salem
through the Principal Sessions Judge, Salem
6. The Superintendent, Central Prison, coimbatore
7. The Public Prosecutor, High Court, Madras
8. The Dy. Inspector General of Police, Chennai-4
9. Mr.V.Jaya Prakash Narayan, Govt. Advocate (Crl. Side)
High Court, Madras
10. The Inspector of Police, Sankagiri.